Saludin bin Surif v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-25 OF 1994
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
14 APRIL 1997

Criminal Law *— Dangerous Drugs Act (Malaysia) — Section 39B(1)(a), (2) — Trafficking in dangerous drugs — Drugs in room which was not occupied by anyone in particular — Whether accused could be presumed to be in possession of drugs*

The appellant had been convicted on a charge of trafficking in 1284.02g of cannabis, an offence alleged to have been committed under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death under s 39B(2) of the Act.

According to the facts, the police party led by Insp Sia Siew Keng ('SP3'), conducted a search of certain premises ('the premises') and found two plastic bags containing what was suspected to be cannabis. According to SP3, the appellant and his girlfriend, SP11 occupied the room marked 'B1' whereas the drugs were found in 'B3' — a room which was not occupied by anyone in particular. SP11 testified that B3 was used as a store room and that it was never locked. She had also used the room to iron clothes and not only had she confirmed that all those residing in the premises had access to the room, but also that anyone who visited the premises had such access.

There was also evidence given by the a witness ('SP12') to the effect that the appellant had smoked cannabis in the premises before and that the appellant had provided the witness with cannabis before. The learned judge admitted such evidence on the ground that there was no challenge of this in cross-examination.

Held, allowing the appeal:

(1) There was no doubt that B3, including the cupboard found therein, in which the cannabis was found, were not only accessible to all those who resided in the premises but also accessible to anyone who came to the premises. Therefore it was clear that the prosecution had failed to prove beyond a reasonable doubt that the appellant had exclusive possession, custody and control of the cannabis found in the room. The judge therefore erred when he invoked the presumption under s 37(d) of the Act against the appellant (see pp 320I and 321A–B).

(2) The general rule is that evidence showing that the accused had committed any other offence other than those charged, or had a disposition to commit the kind of offence charged was inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he was charged. The evidence in relation to the appellant which was given by SP12 was highly prejudicial and ought to have been excluded (see p 322D–E).

(3) It is trite law that inadmissible evidence remained inadmissible whether challenged or not. The judge therefore should not have admitted the evidence against the appellant which was highly prejudicial (see p 322C–D).

[Bahasa Malaysia summary

Perayu telah disabitkan dengan pertuduhan mengedar 1284.02g ganja, satu kesalahan yang telah dilakukan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan telah dijatuhkani hukuman mati di bawah s 39B(2) Akta tersebut.

Berdasarkan fakta, rombongan pihak polis yang diketuai oleh Insp Sia Siew Keng ('SP3') telah menjalankan pengeledahan premis tertentu ('premis tersebut') dan telah menjumpai dua beg plastik mengandungi apa yang disyaki adalah ganja. Menurut SP3, perayu dan teman wanitanya, SP11 telah menduduki bilik bertanda 'B1' manakala dadah telah dijumpai di 'B3' — suatu bilik yang tidak diduduki sesiapapun. SP11 telah memberi keterangan bahawa B3 telah digunakan sebagai bilik setor dan bahawa ianya tidak pernah dikunci. Dia juga telah menggunakan bilik tersebut untuk menggosok pakaian dan dia bukan sahaja telah mengesahkan bahawa semua orang yang menduduki premis tersebut mempunyai akses kepada bilik tersebut malah sesiapa yang mengunjungi premis tersebut mempunyai akses.

Juga terdapat keterangan daripada seorang saksi ('SP12') bahawa perayu pernah menghisap ganja di premis tersebut dan bahawa perayu pernah membekalkan saksi tersebut dengan ganja. Hakim yang arif telah menerimamasuk keterangan tersebut atas dasar bahawa tidak terdapat cabaran keterangan ini dalam soal-balas.

Diputuskan, membenarkan rayuan:

(1) Tiada keraguan bahawa B3, termasuk almari yang dijumpai dalamnya di mana ganja tersebut dijumpai, bukan sahaja berakses kepada mereka yang menduduki premis tersebut malah ianya berakses kepada sesiapapun yang mengunjungi premis tersebut. Maka ianya adalah jelas bahawa pihak pendakwa telah gagal membuktikan tanpa keraguan munasabah bahawa perayu mempunyak milikan eksklusif, jagaan dan kawalan ganja terbust yang dijumpai di bilik. Maka hakim telah membuat kesilapan apabila dia membuat anggapan di bawah s 37(d) Akta tersebut terhadap perayu (lihat ms 320I dan 321A–B).

(2) Rukun amnya adalah bahawa keterangan yang menunjukkan bahawa tertuduh telah melakukan kesalahan lain melainkan apa yang dituduhnya, ataupun mempunyai perangai untuk melakukan kesalahan seperti yang dituduhnya tidak boleh diterimamasuk untuk menunjukkan bahawa dia telah melakukan ataupun mempunyai kecenderungan untuk melakukan kesalahan yang dituduhnya. Keterangan berkenaan dengan perayu yang diberikan

oleh SP12 adalah sangat memudaratkan dan harus ditolak (liihat ms 322D–E).

(3) Adalah undang-undang mantap bahawa keterangan yang tidak boleh diterimamasuk adalah tetap tidak boleh diterimamasuk sama ada ianya dicabar ataupun tidak. Maka hakim tidak seharusnya menerima masuk keterangan terhadap perayu yang sangat memudaratkan itu (lihat ms 322C–D).]

Notes

For a case on possession of drugs for purposes of trafficking, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 170.

Cases referred to

Choo Yoke Choy v PP [1992] 2 MLJ 632 (distd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), (2)

Appeal from: Selangor Criminal Trial No 47–13–1991 (High Court, Shah Alam)

Kitson Foong (*Lim Bee Leong* with him) (*Kitson Foong & Associates*) for the appellant.
Stanley C Augustin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): On 10 September 1994, the High Court at Shah Alam convicted the appellant on a charge of trafficking in 1284.02g of ganja which offence was alleged to have been committed on 23 May 1990 under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and under s 39B(2) of the Act sentenced the appellant to death. There is no dispute that the substance seized was in fact ganja as defined in s 2 of the Act.

The facts of the case are that on 23 May 1990, at about 10.40pm a police party led by Insp Sia Siew Keng ('SP3') — presumably on information received — raided premises No 14A Jalan Kapas, Pelabuhan Kelang. The police party conducted a search of the premises, and in one room marked 'B3' in the sketch plan, found two plastic bags containing what was suspected to be ganja. A plastic bag, yellow in colour (P22), was found in an unlocked cupboard and another red-coloured bag was found on top of the same cupboard.

At the time of the police raid, there were in all five people in the said premises, three male Malays — namely, the appellant, Amirullah bin Hamzah ('SP12') and Mohd Musa bin Mukri (who had since passed away on 25 January 1991) ('Musa'); one male Indian, Kumaravellu a/l

Nagalingam ('SP10') and one female Malay, Intan Zamrud bte Harun ('DW2'). Also found in the premises was one newborn infant of DW2, whose father apparently was Musa, a four-month old infant — the child of the appellant and one Juliana Kuan ('SP11') — and another 11-year old boy of SP11. All the adults found in the premises, except DW2, were arrested for further investigations.

Earlier to the raid at about 10pm SP3 had arrested one Ishak bin Hashim ('SP9') at a restaurant in connection with another drug offence.

The evidence led by the prosecution showed that SP9 led SP3 and his police party to the premises. On arrival at the address which was on the upper floor of a double-storey terrace house, SP3 — faced with a locked grill door — asked SP9 to call out the name 'Din' and soon after, a Malay male, later identified to be Musa, came down and opened the grill door. Immediately upon SP3 identifying himself as the police, Musa ran upstairs followed by SP3 and his police team. In the living room, SP3 found the five adults mentioned earlier.

There were in all five rooms in the premises. SP3 ascertained that the appellant and his girlfriend, SP11 occupied the room marked 'B1'; Musa and his girlfriend, DW2, occupied the room marked 'B2' while the room marked 'B4' was occupied by SP10. The room, marked B3 in which the drugs were found was not occupied by anyone in particular. According to SP10, he rented B4 from the appellant who was the chief tenant of the premises. He confirmed the occupancy of the rooms in the premises as ascertained by SP3. According to SP10, B3 was used by the appellant as a store room and he himself had used the room. According to the evidence of SP9, before his arrest, at about 9.30pm, he went to the premises where he met Musa. According to SP9, Musa took him into B3 which was not locked, and from a cupboard, took out a package and asked him to deliver it to one Wak Alip at the restaurant. At that time, SP9 states that the appellant was in the sitting room with the others. SP12 testified that he used to visit the premises two or three times a week and he confirmed that he himself used to enter B3 which was never locked and he had seen Musa and the appellant also enter the room. He also said that that room was used for 'solekan'. SP11 also testified that B3 was used as a store room, and that it was never locked. It was used to keep old clothes and the room and the cupboard found therein were accessible to everyone living in the premises, to keep old clothes, to do ironing and make up. She also testified that a set of baju Melayu, found in the cupboard, belonged to one Fauzi who used to frequent the premises and who also had access to B3 to pray in. DW2 was a prosecution witness made available to the defence. She testified that she resided in the premises with Musa but that they were not married. She testified that she had used B3 to iron clothes and not only did she confirm that all those residing in the premises had access to the room, but also that anyone who visited the premises had access to the room.

From the evidence of these witnesses, it seems to us that there was no room for doubt that B3 including the cupboard found therein, in which the ganja was found, were not only accessible to all those who resided in the premises but also accessible to anyone who came to the premises.

Therefore, it seems clear to us that the prosecution had failed to prove beyond a reasonable doubt that the appellant above had exclusive possession, custody and control of the ganja found in that room. On this score alone, we feel that the learned judge had erred when he invoked the presumption under s 37(d) of the Act against the appellant. At the close of the prosecution's case, the prosecution itself had in fact established that the appellant had no exclusive possession of the drug found in B3, given the fact that the others in the premises had access to that room. In *Gooi Loo Seng v PP* [1993] 2 MLJ 137, a far worse situation existed vis-a-vis the place where the drug was found.

In that case, the appellant was charged with trafficking 22.469g of heroin. The facts showed that upon detention by the police, the appellant brought the police to the room occupied by him and his girlfriend — where the police recovered from the bottom of a plastic cupboard, two packages containing the heroin. The girlfriend testified that she held a set of keys to the room and that she used the room as her own and she shared the same bed with the appellant. The appellant testified that his girlfriend used to bring her friends to gamble in that room. The Supreme Court, in allowing the appeal, came to the conclusion that not only did the appellant's girlfriend have access to the room but also that her friends 'could have had access to the room if they so wished'. On that evidence, Edgar Joseph Jr SCJ (now FCJ) delivering the judgment of the court at p 142 held:

> We need hardly add, that even if the appellant had known of the presence of the heroin *in his bedroom*, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well. (Emphasis added.)

In *Choo Yoke Choy v PP* [1992] 2 MLJ 632, the facts showed that a party of police officers raided a house. There were 10 persons in the house. On searching the appellant's room which was occupied by the appellant and his wife, the police recovered a plastic bag lying on the floor in which heroin was found. After the appellant was questioned by the police, they recovered more drugs outside the house. In allowing the appeal, the Supreme Court held that with regards to the drugs in the appellant's room, the evidence was not sufficient to establish that the appellant had the drugs in his custody or under his control as there were two people occupying the room.

In the present case, however, the drugs were not found in the appellant's bedroom but in a store room accessible to not less than five adults in the premises and also to others who visited the premises. This was not even a case where others 'could have had access to the room if they so wished' but a case where others in fact had access. This too, was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

For the above reasons, we hold that at the close of the prosecution's case, the learned judge ought not to have called upon the appellant to

enter his defence and ought to have acquitted and discharged him without calling for his defence. A

Apart from this, the appeal records show that the learned judge admitted evidence highly prejudicial to the appellant through the testimony of SP12. SP12 was allowed to adduce evidence that he had frequently visited the premises in order to smoke ganja sometimes with Musa and sometimes with the appellant and that the appellant had smoked ganja in that premises before. The testimony of SP12 was that just before the police raided the premises, he had smoked ganja in the premises which ganja was allegedly provided by the appellant. The learned judge admitted all these simply on the ground that there was no challenge of this in cross-examination and that there was no reason for him to reject such evidence. With respect, we hold that the learned judge erred in law on this issue, as it is trite law that inadmissible evidence remains inadmissible whether challenged or not. We hold that the testimony of SP12 in connection with the appellant was highly prejudicial and ought to be excluded. The general rule is that evidence showing that the accused had committed any other offence other than those charged with, or has a disposition to commit the kind of offence charged with, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he was charged with. Having admitted and considered the highly prejudicial evidence, it was obvious that this had influenced the learned judge to hold that the appellant had exclusive possession, custody or under his control the offending drugs. B C D E

For the above reasons, we are unanimously of the view that the appellant ought to have been acquitted at the close of the case for the prosecution without his defence being called — and in the light of this finding, we feel we need not consider the defence. We allowed the appeal, quashed the conviction and set aside the sentence. The appellant is acquitted and discharged. F

Appeal allowed.

Reported by Mariette Peters-Goh G

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